90-352

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SHARON NAVRATIL, individually and Guardian ad litem for SERENA NAVRATIL, a Minor,
Petitioners,

vs.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTERINSURANCE BUREAU, a reciprocal insurance exchange,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

1. Whether the California Supreme Court violated petitioners rights under the Equal Protection and Due Process Clauses of the United States Constitution when it declined to accept for review the lower State appellate court decision even though the California Supreme Court had accepted for review an earlier case which raised the identical issues raised in petitioner's case.

LIST OF PARTIES

Petitioners are SHARON NAVRATIL, individually and as Guardian ad litem for SERENA NAVRATIL, a Minor.

Respondent is CALIFORNIA STATE AUTOMOBILE ASSOCIATION, INTER-INSURANCE BUREAU, a reciprocal insurance exchange.

Petitioner and Respondent are the same parties as in the proceedings below. JULIUS J. BARTHEL was and is a Defendant and Appellant in the proceedings below.

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CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTERINSURANCE BUREAU, a reciprocal insurance exchange,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Sharon Navratil, individually and Guardian ad litem for Serena Navratil, a Minor, petition for a writ of certiorari to review the decision of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the California Supreme Court denying review of the court of appeals decision (Appendix, infra) has not been reported as of this date.

JURISDICTION

The opinion of the California Supreme Court denying review was issued on June 21, 1990. The order denying reconsideration of its order denying review was issued on July 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sec.1247(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment of the Constitution of the United States of America

STATEMENT OF THE CASE

In this case, the minor, SERNA NAVRATIL was sexually molested in a house by the homeowner. The homeowner was insured by respondent under a homeowners insurance. The minor sued the homeowner for physical injuries resulting from the molestation.

The insurance company then brought the present action for declaratory relief contending it was not liable to provide coverage for injuries arising out of the molestation since it was an intentional act.

The trial court below agreed with the insurance company and granted its motion for summary judgment.

The minor therefore appealed to the California Court of Appeals for the First Appellate District.

Prior to a decision by the First Appellate District, the California Supreme Court granted review of two decisions which raised the same general issue of whether homeowners insurance covers injuries sustained by a minor who has been sexually molested by the homeowner. *State Farm Fire and Casualty Company v. Robin R.*, S 013639(1990); *J.C. Penney Casualty Insurance Company v. M.K.*, S010524 (1990).

The First Appellate District of California on April 3, 1990 issued its decision affirming the trial courts determination of non coverage.

The minor therefore petitioned the California Supreme Court on May 7, 1990 to review the Court of Appeals decision in light that it had already granted review in the above cases. Under Rules adopted by the California Supreme Court it could accept for hearing petitioner's case and order the action deferred until it decided the prior cases. If the Court ruled homeowners insurance did apply in such a situation the petitioner herein could receive the benefits of the above decisions.

On June 21, 1990 the California Supreme Court denied the petition for review. On July 11, 1990 the California Supreme Court denied the minor's request for reconsideration of its order denying review.

As of this date the California Supreme Court has not rendered its decision in either of the above decisions. If the California Supreme Court does eventually rule in the above cases that homeowners insurance does cover injuries to minors who have been sexually molested in the house by the homeowner, the petitioner herein will not benefit.

REASONS FOR GRANTING THE WRIT

I.

WHILE A STATE IS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE APPELLATE REVIEW, WHEN IT ELECTS TO PROVIDE SUCH REVIEW IT MUST APPLY ITS RULES IN A NONDISCRIMINATORY MANNER.

The case presents an opportunity, on a limited and undisputed record, for this Court to correct a violation of the United States Constitution by the State of California through its highest court. It is petitioners' contention the California Supreme Court acted in a discriminatory manner when it elected not to accept for hearing petitioners' case when it had already accepted for hearing an identical case.

A. STANDARD OF REVIEW

1.

A STATE IS NOT REQUIRED BY THE FEDERAL CONSTITUTION TO PROVIDE A RIGHT TO APPELLATE REVIEW.

1. McKane v. Durston, 153 U.S. 684, 687-688 (1934)

2. Griffin v. Illinois, 351 U.S. 12, 18 (1955)

2.

HOWEVER, IF THE STATE DOES ELECT TO PROVIDE APPELLATE REVIEW IT MUST DO SO CONSISTENT WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES AND AVOID ACTING IN AN ARBITRARY OR UNREASONABLE MANNER.

In *Griffin vs. Illinois (supra)* this Court was faced with the issue of whether a criminal defendant who was appealing his conviction had the right to a free transcript of the trial proceedings. The Court held the defendant does have this right.

The Court's reasoning was while the State did not have to provide appellate courts or a right to appellate review at all, if it did provide such review, it cannot discriminate and "at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. (citations omitted). (351 U.S. at p. 18).

In *James v. Reese,* 546 Fed.2d 328 (9th Cir 1976) the appellate court citing Griffin (*supra*) held without an allegation of invidious discrimination petitioners due process argument was without merit.

3.

THE ISSUE BEFORE THIS COURT IS NOT WHETHER THE STANDARDS OF APPEAL ADOPTED BY THE STATE OF CALIFORNIA ARE REASONABLE BUT WHETHER SAID RULES WERE APPLIED IN A CONSTITUTIONAL ACCEPTABLE MANNER TO THE PETITIONER HEREIN.

Petitioner is not contending that the rules of appeal adopted by the State of California through the California Supreme Court are defective. Rather petitioner is contending that said rules were applied to her in a discriminatory manner.

II.

THE CALIFORNIA SUPREME COURT DENIAL OF PETITIONER'S PETITION FOR REVIEW OF THE LOWER COURT DECISION WAS PERFORMED IN A DISCRIMINATORY MANNER IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

A. California Supreme Court Practice of Reviewing Lower Appellate Cases

4.

REVIEW BY THE CALIFORNIA SUPREME COURT OF APPELLATE DECISIONS IS PURELY DISCRETIONARY.

In *People v. Davis,* 147 Cal.346, 81 P. 718 (1905) the court construed a California Constitutional Amendment which provided the California Supreme Court shall have appellate jurisdiction in all cases pending before a District Court of Appeals. (Const. Art 6 Sec. 4).

The high court held it did not have to review all cases decided by the District Court of Appeals but rather only those cases in its discretion it wished to consider. As the Court stated: "For it follows that the parties have no right to insist upon the exercise of this power (of review). They may petition for it, but the action of this court in any case is purely discretionary." See *Lawson v. Kolender,* 658 Fed. Rptr. 2d 1364 at f.n. (9th Cir 1981); J. Poulous and B. Verner, "Review of Intermediate Appellate Court Decisions in California, 15 Hastings L.J. 11, 15-16 (1963); Comment, To Hear or Not to Hear: A Question for the California Supreme Court, 3 Stanford L.Rev. 243, 266-267 (1951).

There are no reported decisions concerning the exercise of the Court's discretion.

5.

THE CALIFORNIA SUPREME COURT HAS ADOPTED A STANDARD OF WHICH CASES IT WILL REVIEW.

Rule 29(a) California Rules of Court promulgated by the Judicial Council provides as follows:

Rule 29. Grounds for Review in Supreme Court

(a) [Grounds] Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

Amended Nov. 11, 1966; May 6, 1985.

(b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

6.

THE CALIFORNIA SUPREME COURT HAS FURTHER PROMULGATED RULES CONCERNING REVIEW OF CASES WHICH RAISES ISSUES ALREADY PRESENTED IN CASES ACCEPTED BY THE COURT

Rule 29.2(c) California Rules of Court provides as follows:

> (c) [Grant and Hold] After granting review of a decision of a Court of Appeal, the Supreme Court may order action on the cause deferred until disposition of another cause pending before the court.

Therefore if a case raises an issue that is present in another case which has been accepted for hearing, the California Supreme Court has the authority to accept for hearing the later case but refrain from deciding the case until the court disposes of the first case.

7.

IF THE CALIFORNIA SUPREME COURT DECLINES TO REVIEW THE LOWER COURT DECISION, THE LOWER APPELLATE COURT DECISION IS BINDING ON THE PARTIES AND IS NOT SUBJECT TO REVIEW OR MODIFICATION AS A RESULT OF SUBSEQUENT DECISIONS BY THE CALIFORNIA SUPREME COURT.

Upon denial of the petition for review, the judgment of the Court of Appeal is affirmed and binding on the parties. Rule 29.4(a) California Rules of Court.

The opinion of the Court of Appeals is not subject to further review or modification. See Witkin, 9 California Procedure 3d ed. Sec. 720 et. seq. p. 694.

B. Effect of California Supreme Court Actions on Petitioner's Case

8.

THE CALIFORNIA SUPREME COURT BY DENYING THE PETITION FOR REVIEW IN PETITIONER'S CASE BUT ALLOWING IT IN OTHER CASES HAS DISCRIMINATED AGAINST THE PETITIONER IN VIOLATION OF THE CONSTITUTION.

As a result of the California Supreme Court denial of petitioner's petition for review, petitioners case is at an end.

If the California Supreme Court subsequently allows recovery in the State Farm and/or J.C. Penney Casualty Insurance Company cases (supra) petitioner herein will not benefit.

The California Supreme Court without any basis in fact has discriminated against the petitioner in violation of the Constitution. There is no logical reason why petitioner's petition for review was not granted.

CONCLUSION

Petitioner has been the victim of one of the most horrible events which could happen to a minor. She now is a victim of the judicial process which was designed to protect her.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the order of the California Supreme Court denying review of the lower appellate court judgment.

DATED: August 22, 1990

THOMAS EDWARD WALL
Counsel for Petitioners

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT,
DIVISION THREE

CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,
Plaintiff and Respondent,

VS.

JULIUS J. BARTHEL et al.,
Defendants and Appellants.

Super. Ct. No. 54692
Napa County

I. Synopsis of Case

Appellant Sharon Navratil (Navratil), individually and as guardian ad litem of Serena Navratil, a minor (Serena), filed two personal injury actions against appellant Julius J. Barthel (Barthel) based on two alleged acts of child molestation committed by Barthel against Serena. Barthel previously had pled nolo contendere to criminal charges of two counts of violation of Penal Code section 288, subdivision (a), based upon the same acts alleged in the personal injury actions.

In response to the civil actions, Barthel made a claim for coverage, including a duty to defend, upon respondent California State Automobile Association, Inter-Insurance Bureau, a reciprocal insurance exchange (CSAA), under his homeowner's insurance policy issued by CSAA, and specifically section II, Coverage E thereof, which provided: "If a claim is made or a suit is brought against any *insured* for damages because of *personal injury* or *property damage* caused by an *occurrence* to which this coverage applies, we will: [¶] 1. pay up to our limit of liability for the damages for which the *insured* is legally liable; and [¶] 2. provide a defense at our expense . . . ." The policy defined "occurrence" as "an accident, including exposure to conditions which results during the policy period in: [¶] a. *personal injury;* or [¶] b. *property damage.*"

CSAA denied coverage under the policy, relying on an exclusionary clause for personal injury or property damage, "the type of which is expected or intended by the *insured* . . . ." CSAA then filed the instant action against Barthel and Navratil, seeking a judicial declaration of noncoverage based upon the exclusionary clause as well as Insurance Code section 533 (insurer not liable for loss caused by insured's willful act).

CSAA subsequently moved for summary judgment. (Code Civ. Proc., § 437c.) The trial court granted summary judgment, declaring that the policy did not provide coverage for the acts or injuries alleged in the personal injury actions. In its statement of decision, the court ruled that (1) as a matter of law the acts of child molestation by Barthel did not constitute accidental "occurrence[s]" within the scope of coverage under the policy, because intentional acts are not accidental; (2) the acts of child molestation for which Barthel was convicted

under Penal Code section 288, subdivision (a), were excluded from coverage as a matter of law under *Allstate Ins. Co.* v. *Kim W.* (1984) 160 Cal.App.3d 326; and (3) the evidence before the court, including Barthel's deposition testimony, established his acts were willfull and not accidental.

Barthel and Navratil appeal. We affirm.

II.

Pertinent Case Law and Discussion

Allstate Ins. Co. v. *Kim W., supra,* 160 Cal.App.3d 326 is the leading appellate decision directly pertinent to the specific issues before us. In *Kim W.,* a minor filed a complaint through her guardian ad litem against Korte seeking damages for injuries resulting from several acts of sexual assult. Korte was insured under a homeowner's insurance policy which expressly excluded coverage for bodily injury or property damage "intentionally caused by an insured person." (*Id.,* at pp. 229-330.) The insurer brought an action for declaratory relief against both Korte and the minor, seeking a declaration that the policy provided no coverage to Korte for the acts alleged in the minor's complaint. (*Id.,* at p. 330.)

The insurer's complaint alleged that Korte had engaged in conduct constituting a violation of Penal Code section 288. The complaint referred to a criminal proceeding in which Korte had been charged with various sexual offenses against children. (*Allstate Ins. Co.* v. *Kim W., supra,* 160 Cal.App.3d at p. 333, fn. 3.) Korte answered admitting that he had engaged in conduct which constituted a violation of Penal Code section 288. The trial court thereafter granted the insurer's motion for judgment on the pleadings. (*Id.,* at p. 30.)

On appeal, the court affirmed. The court rejected the argument that the insurer was not exonerated from liability under the policy because, though the act may have been willful, the resulting injury was not intended or expected. The court stated: "[U]nder certain circumstances, the nature of the intentional act of the insured is such that an intent to cause at least some harm can be inferred as a matter of law, and that as long as some harm is intended, it is immaterial that harm of a different magnitude from that contemplated actually resulted. [Citations.] We conclude that an act which constitutes a violation of Penal Code section 288 is such an act." (*Allstate Ins. Co.* v. *Kim W., supra,* 160 Cal. App.3d at p. 332.) The court accordingly found the injuries alleged in the minor's complaint fell within the scope of the exclusionary clause of the policy.

Kim W. has been followed and affirmed in recent appellate decisions. (See, e.g., *Fire Insurance Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1023-1024 [violation of Penal Code section 288 creates an inference of an intent to injure which may not be overcome by evidence of a subjective lack of intent to harm so as to avoid coverage exclusion].)

J. C. Penney Casualty Ins. Co. v. *M. K.* (1989) 209 Cal.App.3d 1208, cited by appellants, constitutes the sole California authority for their position that the insurance exclusion for intentional acts requires proof of a preconceived subjective intent to inflict harm, and that a violation of Penal Code section 288 does not necessarily give rise to an inference of such intent. Significantly, however, the California Supreme Court granted review of that decision (review granted July 26, 1989). That decision accordingly may no longer be relied upon as authority.

Kim W. and its progeny support the trial court's determination that the alleged injuries resulting from acts for which Barthel was convicted of violations of Penal Code section 288, subdivision (a), fell within the scope of the policy's exclusionary clause, as well as Insurance Code section 533, as a matter of law. The granting of summary judgment therefore did not constitute error.

III.

Disposition

The judgment is affirmed.

Strankman, J.

We concur:

White, P.J.

Barry-Deal, J.

No: A043989

SUPREME COURT
FILED
MAY 7, 1990
Robert Wandruff Clerk
DEPUTY

IN THE
SUPREME COURT OF CALIFORNIA
CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,
Plaintiff and Respondent,
vs.
JULIUS J. BARTHEL,
et al.,
Defendant and Appellants.

ON REVIEW FROM THE COURT OF APPEAL FOR
THE
FIRST APPELLATE DISTRICT DIVISION THREE
NAPA County NO. 54692

PETITION FOR REVIEW

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No: A043989

IN THE
SUPREME COURT OF CALIFORNIA
CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,
Plaintiff and Respondent,
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ON REVIEW FROM THE COURT OF APPEAL FOR
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IN THE
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INTER-INSURANCE BUREAU,
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vs.
JULIUS J. BARTHEL,
et al.,
Defendants and Appellants.

NAPA COUNTY NO. 54692

PETITION FOR REVIEW

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

REASON FOR REVIEW

This action involves the issue of whether a homeowner's insurance policy will cover personal injuries resulting from the sexual molestation of a minor. The trial court following *Allstate v. Kim,* 160 Cal.App. 3d 326 (1984) held coverage did not apply. The appellate court affirmed the judgment.

This Court has accepted for review a similar case, *J.C. Penney Casualty Insurance Company v. M.K.,* 209 Cal.App. 3d 1208 (accepted for hearing on July 24, 1989). To ensure uniformity of decisions it is necessary for this Court to grant review of the present case.

ISSUES ON APPEAL

When a defendant pleads guilty to *Penal Code* Section 288, is the act of touching the minor a wilful act as a matter of law within the meaning of *Insurance Code* Section 533 or is the subjective intent of the defendant taken into consideration?

STATEMENT OF FACTS

On August 2 and August 3, 1986 the minor, SERENA NAVRATIL, was visiting defendant JULIUS J. BARTHEL'S home.

While at the house there were two separate touchings of the minor by Mr. Barthel.

On August 2, 1986 Mr. Barthel kissed and touched the minor and accidently touched her breasts. Mr. Barthel testified in his deposition that the kiss and hugging was done because he felt Serena needed affection since her parents had gone through a separation. Mr. Barthel further testified he did not see the minor's breasts nor did he touch the breasts for sexual gratification.

The second touching occurred on August 3, 1986. It is stipulated by the parties the homeowner's policy would not cover the second touching.

Mr. Barthel pleaded nolo contendere to a violation of Section 288a *Penal Code* based on both touchings.

At the time of the incidents Mr. Barthel had homeowner's insurance issued by the appellant. The insurance policy was in full force and effect at the time of the touching.

PROCEDURAL HISTORY

On October 21, 1987 Respondent filed a complaint for declaratory relief based on a complaint filed by appellants against their insured, Barthel. Appellants' complaint was based on negligence and other causes of action arising out of the touchings.

An answer to Respondent's complaint was filed contending the homeowner's coverage did apply.

On June 30, 1988 Respondent filed its motion for summary judgment. The appellants filed a counter summary judgment motion. Both motions involved whether the policy applied.

On September 1, 1988 the trial court granted Respondent's motion holding coverage did not apply. A notice of appeal was timely filed.

Briefs were filed with the appellate court and oral argument was presented to the court of appeals.

On April 3, 1990 the Court of Appeals issued its opinion affirming the trial court's decision.

LEGAL DISCUSSION

Introduction

This discussion is limited to the application of *Allstate v. Kim,* 160 Cal.App.3d 326 (1984). If the court wishes a full briefing on the other issues raised in this action, same will be provided.

1.

CONDUCT WHICH IS IN VIOLATION OF SECTION 288 OF THE *PENAL CODE* HAS BEEN HELD BY KIM v. ALLSTATE AS A WILFUL ACT WITHIN THE MEANING OF *INSURANCE CODE* SECTION 533 AS A MATTER OF LAW.

In *Allstate v. Kim,* 160 Cal.App.3d 326, 206 Cal.Rptr. 609 (1984) the court held, "an act which is in violation of *Penal Code* Section 288 is a wilful act within the meaning of *Insurance Code* Section 533." (160 Cal.App.3d 326 at p. 333).

The reasoning of the *KIM* court was that the nature of the conduct in violating Section 288 is such that the intent to cause at least some harm can be inferred as matter of law regardless of whether the harm actually occurred.

The *KIM* reasoning is unique in that instead of examining the facts of each particular act as would be required under the general rules in interpreting Section 533 and determining on a case by case basis whether the insured had a preconceived design to cause the damage, *KIM* held as a matter of law, conduct in violation of Section 288 per se falls under Section 533. This "strict liability" approach has been criticized by other courts. See *STATE FARM v. MCINTYRE,* 652 Fed. Supp. 177 (N.D. Ala. 1977) (holding that Alabama law would not allow the intent to be inferred as a matter of law).

Further, as explained supra, the *KIM* decision has to be read very carefully. The case should only apply to a very limited factual situation.

2.

UNDER *KIM* THE FACT THAT MR. BARTHEL PLEADED NOLO CONTENDERE TO SECTION 288 OF THE *PENAL CODE* IS IRRELEVANT TO THE ISSUE OF INSURANCE COVERAGE.

In *KIM,* the defendant pleaded guilty to one offense against one child but the other alleged offenses were dismissed. The *KIM* court held this fact was irrelevant.

As the *KIM* court held, "whether or not he has actually been convicted of such offenses is irrelevant for purposes of these appeals." (160 Cal.App.3d at p. 333 at f.n. 3).

Rather, the *KIM* court stated the approach is to look at the "act" itself and determine whether it is a violation of *Penal Code* Section 288. If the "act" is determined to be a violation of the *Penal Code,* the "act" is a wilful act causing coverage to be denied under Section 533.

Therefore the fact that Mr. Barthel pleaded nolo contendere to violations of *Penal Code* Section 288 is irrelevant to the issue of whether coverage should apply. The proper approach was for the trier of fact to make its own determination whether the acts themselves violated the *Penal Code.*

3.

THE ACTS OF MR. BARTHEL WHICH WERE COMMITTED ON AUGUST 02, 1986 RAISE A TRIABLE ISSUE OF FACT WHETHER THEY ACTUALLY ARE IN VIOLATION OF *PENAL CODE* SECTION 288.

To be found guilty of Section 288 of the *Penal Code* the prosecution must prove three items beyond a reasonable doubt:

(1) The defendant committed a lewd act;

(2) On a child under the age of 14; and

(3) The defendant had the intent to arouse or gratify the lust of either party when he committed the act. *People v. Nothangel,* 187 Cal.App.2d 219, 225.

As to the acts committed on August 02, 1986 while arguably the first two elements were present (while it is certainly doubtful whether the hugging constitutes a "lewd act") the required element of "intent" is subject to severe dispute.

The intent required under Section 288 is a "specific intent" which must be proved beyond a reasonable doubt. See *People v. Worthington,* 38 Cal.App.3d 359, 113 Cal.Rptr. 322 (1974).

As documented in the deposition of Mr. Barthel, he testified he had no intent to sexually arouse either himself or the minor by his acts of August 02, 1986. His only expressed intent was to show affection to the minor who had recently experienced the tragedy of her parents going through a separation.

There was a severe issue of fact whether the touching of August 02, 1986 amounted to a violation of Section 288.

4.

SINCE CONVICTION OF *PENAL CODE* SECTION 288 IS NOT CONCLUSIVE AND THERE HAS BEEN NO CIVIL ADMISSION, THE KIM DECISION HAS NO APPLICATION TO THE CASE AT BAR.

As explained supra, the fact that Mr. Barthel pleaded nolo contendere to a violation of Section 288a of the *Penal Code* is not conclusive on the issue of intent.

In *KIM* the court had little problem in coming to the conclusion that the defendant violated the *Penal Code* since the defendant civilly admitted the violation. In the case at bar Mr. Barthel has not made such an admission. In fact in his First Affirmative Defense to the declaratory relief action Mr. Barthel stated he is liable to the minor because of his "negligent acts".

CONCLUSION

Sexual molestation of children is an issue now receiving major interest from the public. The courts are trying to grapple with the apparent conflict in "the public strong interest in the compensation of victims" (See *Congregation of Rodef Shalom v. Am. Motorist Co.,* 91 Cal.App.3d 690 (1970) and the principle codified in *Civil Code* Section 3517 that "no one can take advantage of his own wrong." This conflict has caused a divergence among the appellate divisions in this State as well as a divergence in the Federal Courts and between the states themselves.

The appellants herein are not seeking coverage simply because of the nature of the act or the age of the victim. What they are seeking and what they deserve is an opportunity for a trier of fact to make the crucial decision of the intent of the offender when he committed the act. If the evidence supports Mr. Barthel's own deposition testimony that he did not have the specific intent required under Section 288a the appellants are entitled to be compensated for the severe injuries incurred. If the evidence proves otherwise appellant's recourse is in the criminal courts.

DATED: May 04, 1990

(SIG)

THOMAS EDWARD WALL

SUPREME COURT FILED
JUNE 21 1990
Robert Wandruff Clerk

DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Three, No. A043989
S015437

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE,
Respondent,

VS.

JULIUS J. BARTHEL Et Al.,
Appellants.

Appellant's petition for review DENIED.

PANELLI
Acting Chief Justice

Supreme Court of California
San Francisco, California
ROBERT F. WANDRUFF
Court Administrator and Clerk of the Supreme Court

July 11, 1990

Thomas Edward Wall, Esq.
12063 W. Jefferson Blvd.
Culver City, CA 90230

Re: S015437 — CSAA v. Barthel

Dear Mr. Wall:

The Court has read and considered your letter dated July 2, 1990. I have been directed to inform you that the order filed June 21, 1990 is correct and the matter will not be reconsidered.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

By: John C. Rossi
Assistant Clerk-
Administrator

JCR:sf
cc: Stephen S. Harper

(2)

No. 90-352

In The

Supreme Court of the United States

October Term, 1990

SHARON NAVRATIL, individually and Guardian ad litem for SERENA NAVRATIL, a Minor,

Petitioners,

v.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTERINSURANCE BUREAU, a reciprocal insurance exchange,

Respondent.

OPPOSITION TO WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED FOR REVIEW

Implicit in petitioner's formulation of the question presented for review is an unwarranted assumption that the present case is "identical" to two other cases accepted for review by the California Supreme Court. The present case is not, however, identical to those cases. The relevant differences, discussed below, demonstrate that the California Supreme Court did not deny petitioner's Due Process or Equal Protection rights by declining to grant discretionary review.

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JURISDICTION

Petitioner claims that the jurisdiction of the Court is "invoked" pursuant to Title 28 U.S.C. §1247(3). There is, however, no §1247 within Title 28. Perhaps petitioner meant to "invoke" the Court's jurisdiction pursuant to Title 28 U.S.C. §1257(a). As the Court knows, review of a writ of certiorari, including a writ of certiorari authorized by §1257(a), is purely discretionary. Title 28 U.S.C. Supreme Court Rules, Rule 10.

The present case does not warrant the Court's discretionary review. The issue presented in this case involves the interpretation of a California statute prohibiting insurance companies from covering losses "caused by the wilful act of the insured." California Insurance Code §533. Neither the statute nor the application of the statute to this case are matters of national or federal Constitutional significance.

STATEMENT OF THE CASE

In August of 1986, Julius Barthel was found guilty of two felony counts of child molestation following a plea of nolo contendre. The victim of the crime, petitioner SERENA NAVRATIL, a minor, brought suit against Mr. Barthel for damages. Respondent CALIFORNIA STATE AUTOMOBILE ASSOCIATION (hereinafter referred to as CSAA), Mr. Barthel's insurer, sought a declaratory judicial determination that child molestation is not within the scope of coverage of Mr. Barthel's homeowner's insurance policy.

On September 1, 1988 the trial court granted CSAA's summary judgment motion. The court concluded that the evidence before it, including a deposition of Mr. Barthel, demonstrated that Mr. Barthel's conduct was wilful, and that, pursuant to California Insurance Code §533, his wilful acts are not covered by his homeowner's insurance policy (J.A. 2-3).

On appeal, the California Court of Appeals affirmed the trial court's ruling (J.A. 5). In June of 1990, the California Supreme Court denied Ms. Navratil's petition for review (J.A. 17).

Two cases involving Penal Code §288(a) violations are currently pending before the California Supreme Court. *State Farm Fire and Casualty Company v. Robin R.*, 216 Cal.App.3d 132, 264 Cal.Rptr. 326 (1989), *review granted February 15, 1990* (No. S013639); *J.C. Penney Casualty Insurance Company v. M.K.*, 209 Cal.App.3d 1208, 257 Cal.Rptr. 801 (1989), *review granted July 26, 1990* (No. S010524). While petitioner contends that these cases are identical to the present case, they are in fact distinguishable. The differences between these cases and this case are discussed below.

SUMMARY OF ARGUMENT

Petitioner contends that the California Supreme Court violated her Fourteenth Amendment Due Process and Equal Protection rights by declining to grant her petition for review. Petitioner contends that the California Supreme Court's failure to grant review deprives her of the opportunity to benefit from the ultimate resolution of

the two cases currently pending before the California Supreme Court. This contention is predicated on the erroneous assumption that the three cases are in fact identical.

The three cases are similar but not identical. Crucial differences exist between these cases. In *State Farm v. Robin R., supra,* the court held that a California Penal Code §288(a) violation requires, as a matter of law, a presumption of an intent to harm the victim. In *J.C. Penney, supra,* the court held that a §288(a) violation does not permit even an inference of an intent to do harm. In the present case, the court held that a §288(a) violation permits an inference of an intent to harm the victim. These make it unlikely that petitioner will benefit from the final disposition of the other two cases before the California Supreme Court.

Even if it were possible for petitioner to benefit from the final dispositions of *State Farm v. Robin R.* and *J.C. Penney,* no cases support her contention that, in the absence of invidious discrimination, the Due Process and Equal Protection Clauses govern the California Supreme Court's discretionary review.

ARGUMENT

I. SINCE THE ISSUE IN THIS CASE IS NOT OF NATIONAL OR CONSTITUTIONAL SIGNIFICANCE, THE UNITED STATES SUPREME COURT NEED NOT INVOKE ITS DISCRETIONARY JURISDICTION.

Title 28 U.S.C. Supreme Court Rules, Rule 10 articulates jurisdictional considerations governing review on a

writ of certiorari. While these considerations are not exhaustive, nor necessarily controlling, they do provide insights as to what matters the Court will consider. Since this case was not heard in the United States Court of Appeals, and does not involve a federal question, subsections (1)(a) and (1)(b) are inapplicable.

Subsection (1)(c) is, however, pertinent. Subsection (1)(c) states that the Court will likely hear a case "when a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with the applicable decisions of this Court."

The present case does not involve an important federal question, nor does the state court's disposition of the cases conflict with decisions of this Court. Rather, this case involves the application of a California statute. Petitioner's claim that the state court's application of this statute violates the Due Process and Equal Protection clauses is without merit.

A. Since this case is not identical to the two other cases currently pending before the California Supreme Court, it is unlikely that the California Supreme Court's rulings will affect petitioner.

Petitioner contends that this case is identical to *State Farm Fire and Casualty Company v. Robin R.*, 216 Cal.App.3d 132, 264 Cal.Rptr. 326 (1989), *review granted February 15, 1990* (No. S013639), and *J.C. Penney Casualty Insurance Company v. M.K.*, 209 Cal.App. 3d 1208, 257 Cal.Rptr. 801 (1989), *review granted July 26, 1990* (No.

S010524), two cases currently pending before the California Supreme Court. These case, however, are not identical, and it is unlikely that the rulings in these cases will affect petitioner in any way.

In the first case, *State Farm v. Robin R., supra,* the California Court of Appeals held that a California Penal Code §288(a) violation warrants an irrebuttable presumption of an intent to harm the victim. In the range of possible approaches to this issue *State Farm v. Robin R.* represents one end of the spectrum. At the other end of the spectrum is the second case, *J.C. Penney v. M.K., supra.* In *J.C. Penney,* the California Court of Appeals held that a California Penal Code §288(a) violation does not permit an inference or a presumption of an intent to harm the victim. Since the holdings in these cases conflict, the California Supreme Court properly granted review.

Relying on *Allstate Insurance Company v. Kim W.,* 160 Cal.App.3d 326, 206 Cal.Rptr. 609 (1984), the court of appeal in the present case held that a violation of California Penal Code §288(a) permits an inference of an intent to harm the victim. California Insurance Code §533 forbids insurance companies from covering losses "caused by the wilful act of the insured." The court also held that an intent to harm the victim constitutes a wilful act under California Insurance Code §533. *Id.* at 332.

While *Allstate v. Kim W.* permits an inference of an intent to harm the victim, the case suggests that the defendant may rebut this inference. This crucial difference distinguishes *Allstate v. Kim W.* and the present case from *State Farm v. Robin R.* and *J.C. Penney.*

It is also noteworthy that the California Supreme Court denied review in *Allstate v. Kim W.* The approach taken in *Allstate v. Kim W.*, and followed in the present case, represents a rational approach to this issue. While denial of a petition for review to the California Supreme Court does not suggest an affirmance of the lower court's decision, it is relevant to the California Supreme Court's view of the case. *DiGenova v. State Board of Education*, 57 Cal.2d 167, 178, 18 Cal.Rptr. 369, 367 P.2d 865 (1962). Consequently, the California Supreme Court's denial of petitioner's request for review suggests that the approach taken by the appellate court in this case does not require alteration.

B. Assuming, *arguendo*, that petitioner could benefit from the California Supreme Court's rulings, the Equal Protection and Due Process Clauses do not mandate review of this case by the California Supreme Court.

The cases petitioner cite do not support the argument that the Due Process and Equal Protection Clauses of the Fourteenth Amendment mandate that the California Supreme Court hear this case.

Petitioner cites *Lawson v. Kolender*, 658 F.2d 1362, 1364 (9th Cir. 1981), a federal case involving the constitutionality of a California statute, in support of the proposition that the California Supreme Court's appellate review is purely discretionary. The California Court of Appeals stated in *Gilbert v. Municipal Court of North Orange County Judicial District*, 73 Cal.App.3d 723, 140 Cal.Rptr. 897 (1984), that the California Supreme Court has discretionary jurisdiction over cases tried in a superior court. *Id.* at

729. In other words, it is well established that the California Supreme Court has discretionary jurisdiction over the present case.

Since it is undisputed that the California Supreme Court has discretion to accept, or reject, cases as it deems appropriate, it follows that the Due Process and Equal Protection Clauses merely require that the court not act in a discriminatory fashion. There is no evidence that the California Supreme Court acted in a discriminatory fashion in this case. Its decision to reject this case for review was purely a matter of discretion.

Notwithstanding this reality, petitioner implies that *Griffin v. Illinois*, 351 U.S. 12 (1955), requires that the California Supreme Court hear petitioner's case. *Griffin v. Illinois*, however, has nothing to do with the exercise of discretionary review of a state Supreme Court. The case involved two indigent defendants convicted of armed robbery who sought to appeal their conviction in the Illinois Supreme Court. Seeking to proceed *forma pauperis*, they were unable to pay for copies of the Transcript and Court Record. As a result, they were denied access to an appeal. The United States Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require states to provide rich and poor equal access to the appellate process. *Id.* at 19. The present case has nothing to do with access to an appeal. The present case relates to the California Supreme Court's exercise of discretion, and this Court in *Griffin v. Illinois*, said nothing about discretionary jurisdiction.

Another case cited by petitioner does relate to the California Supreme Court's exercise of discretionary

review. This case, however, does not advance petitioner's position. In *James v. Reese*, 546 F.2d 325 (9th Cir. 1976), petitioner alleged, *inter alia*, that the California Supreme Court denied him Due Process by rejecting his petition for review. The Ninth Circuit summarily rejected this claim: "[T]he allegation that the petitioner, even in the absence of an allegation of invidious discrimination, has a Due Process right to be granted a hearing by the California Supreme Court is simply without merit." *Id.* at 328. Unable to establish that her case is identical to the two cases currently before the California Supreme Court, petitioner has not established that the California Supreme Court discriminated against her.

The California Constitution provides for discretionary appellate review by the Supreme Court. Absent evidence that the California Supreme Court exercises this power in a discriminatory fashion, the Due Process and Equal Protection Clauses should not govern the California Supreme Court's discretion. Since Petitioner has not presented this Court with any evidence demonstrating that the California Supreme Court acted with discrimination in declining to review this case, the California Supreme Court acted consistent with Constitutional guidelines, therefore, the petition should be denied.

CONCLUSION

The California Supreme Court's denial of review was within its discretion, and consistent with the Constitution. Accordingly, respondent respectfully request that the Court deny petitioner's writ of certiorari.

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APPENDIX

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,
Plaintiff and Respondent,

VS.

JULIUS J. BARTHEL, et al.,
Defendants and Appellants.

Super. Ct. No. 54692
Napa County

I. Synopsis of Case

Appellant Sharon Navratil (Navratil), individually and as guardian ad litem of Serena Navratil, a minor (Serena), filed two personal injury actions against appellant Julius J. Barthel (Barthel) based on two alleged acts of child molestation committed by Barthel against Serena. Barthel previously had pled nolo contendere to criminal charges of two counts of violation of Penal Code section 288, subdivision (a), based upon the same acts alleged in the personal injury actions.

In response to the civil actions, Barthel made a claim for coverage, including a duty to defend, upon respondent California State Automobile Association, Inter-Insurance Bureau, a reciprocal insurance exchange (CSAA), under his homeowner's insurance policy issued

by CSAA, and specifically section II, Coverage E thereof, which provided: "If a claim is made or a suit is brought against any *insured* for damages because of *personal injury or property damage* caused by an *occurrence* to which this coverage applies, we will: [¶] 1. pay up to our limit of liability for the damages for which the *insured* is legally liable; and [¶] 2. provide a defense at our expense. . . ." The policy defined "occurrence" as "an accident, including exposure to conditions which results during the policy period in: [¶] a. *personal injury;* or [¶] b. *property damage.*"

CSAA denied coverage under the policy, relying on an exclusionary clause for personal injury or property damage, "the type of which is expected or intended by the *insured*. . . ." CSAA then filed the instant action against Barthel and Navratil, seeking a judicial declaration of noncoverage based upon the exclusionary clause as well as Insurance Code section 533 (insurer not liable for loss caused by insured's willful act).

CSAA subsequently moved for summary judgment. (Code Civ. Proc., § 437c.) The trial court granted summary judgment, declaring that the policy did not provide coverage for the acts or injuries alleged in the personal injury actions. In its statement of decision, the court rule that (1) as a matter of law the acts of child molestation by Barthel did not constitute accidental "occurrence[s]" within the scope of coverage under the policy, because intentional acts are not accidental; (2) the acts of child molestation for which Barthel was convicted under Penal Code section 288, subdivision (a), were excluded from coverage as a matter of law under *Allstate Ins. Co. v. Kim W.* (1984) 160 Cal.App.3d 326; and (3) the evidence before

the court, including Barthel's deposition testimony, established his acts were willful and not accidental.

Barthel and Navratil appeal. We affirm.

II.

Pertinent Case Law and Discussion

Allstate Ins. Co. v. Kim W., supra, 160 Cal.App.3d 326 is the leading appellate decision directly pertinent to the specific issues before us. In *Kim W.,* a minor filed a complaint through her guardian ad litem against Korte seeking damages for injuries resulting from several acts of sexual assult. Korte was insured under a homeowner's insurance policy which expressly excluded coverage for bodily injury or property damage "intentionally caused by an insured person." (*Id.,* at pp. 229-330.) The insurer brought an action for declaratory relief against both Korte and the minor, seeking a declaration that the policy provided no coverage to Korte for the acts alleged in the minor's complaint. (*Id.,* at p. 330.)

The insurer's complaint alleged that Korte had engaged in conduct constituting a violation of Penal Code section 288. The complaint referred to a criminal proceeding in which Korte had been charged with various sexual offenses against children. (*Allstate Ins. Co. v. Kim W., supra,* 160 Cal.App.3d at p. 333, fn. 3.) Korte answered admitting that he had engaged in conduct which constituted a violation of Penal Code section 288. The trial court thereafter granted the insurer's motion for judgment on the pleadings. (*Id.,* at p. 30.)

On appeal, the court affirmed. The court rejected the argument that the insurer was not exonerated from liability under the policy because, though the act may have been willful, the resulting injury was not intended or expected. The court stated: "[U]nder certain circumstances, the nature of the intentional act of the insured is such that an intent to cause at least some harm can be inferred as a matter of law, and that as long as some harm is intended, it is immaterial that harm of a different magnitude from that contemplated actually resulted. [Citations.] We conclude that an act which constitutes a violation of Penal Code section 288 is such an act." (*Allstate Ins. Co. v. Kim W., supra,* 160 Cal.App.3d at p. 332.) The court accordingly found the injuries alleged in the minor's complaint fell with the scope of the exclusionary clause of the policy.

Kim W. has been followed and affirmed in recent appellate decisions. (See. e.g., *Fire Insurance Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1023-1024 [violation of Penal Code section 288 creates an inference of an intent to injure which may not be overcome by evidence of a subjective lack of intent to harm so as to avoid coverage exclusion].)

J. C. Penney Casualty Ins. Co. v. M. K. (1989) 209 Cal.App.3d 1208, cited by appellants, constitutes the sole California authority for their position that the insurance exclusion for intentional acts requires proof of a preconceived subjective intent to inflict harm, and that a violation of Penal Code section 288 does not necessarily give rise to an inference of such intent. Significantly, however,

the California Supreme Court granted review of that decision (review granted July 26, 1989). That decision accordingly may no longer be relied upon as authority.

Kim W. and its progeny support the trial court's determination that the alleged injuries resulting from acts for which Barthel was convicted of violations of Penal Code section 288, subdivision (a), fell within the scope of the policy's exclusionary clause, as well as Insurance Code section 533, as a matter of law. The granting of summary judgment therefore did not constitute error.

III.

Disposition

The judgment is affirmed.

Strankman, J.

We concur:

White, P.J.

Barry-Deal, J.

SUPREME COURT FILED
JUNE 21 1990
Robert Wandruff Clerk

DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Three, No. A043989
SO15437

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE,
Respondent,

vs.

JULIUS J. BARTHEL ET AL.,
Appellants.

Appellant's petition for review DENIED.

PANELLI
Acting Chief Justice
